Ipmuda Bhd v Eurodec Development and Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–28–796 OF 2005
ROHANA YUSUF J
9 SEPTEMBER 2008

Company Law — Winding up — Proof of debts — Interest on debts proved — Official receiver — Substituting interest of 1.5%pm in judgment to 6%pa — Whether s 291 of the Companies Act 1965 read together with s 43(6) of the Bankruptcy Act 1967 becomes law applicable to proof of debts — Whether will have effect of capping interest rate to 6% in proof of debts — Whether r 87 of the Companies (Winding Up) Rules 1972 applicable in dealing with issue on interest — Companies Act 1965 s 291 — Bankruptcy Act 1967 s 43(6) — Companies (Winding Up) Rules 1972 r 87

Statutory Interpretation — Construction of statutes — Conflicting statutes — Capping interest rate applicable on debts proved — Conflict between provisions in Acts of Parliament and subsidiary legislation — Section 291 of the Companies Act 1965 read together with s 43(6) of the Bankruptcy Act 1967 inconsistent with r 87 of the Companies (Winding Up) Rules 1972 — Whether maxim generalibus specilia derogant applicable — Whether s 23 of the Interpretation Acts 1948 and 1967 applicable in reconciling conflict

The petitioner herein made an application to reverse or vary the decision of the official receiver ('OR') on proved debts. The OR had substituted an interest of 1.5%pm given by the judgment dated 20 January 2005 with an interest of 6%pa on the debt proved. The judgment sum of RM167,017.62 together with a contractual interest rate of 1.5%pm was obtained against the defendant. Based on that judgment, the petitioner petitioned for the respondent to be wound up under s 218 of the Companies Act 1965 ('Act') and it was granted by this court on 19 January 2006. The petitioner filed its proof of debts for a total sum of RM206,110.38. On 28 January 2008, the OR admitted the debt of only RM164,303.05 after capping the interest rate at 6%pa instead of the 1.5%pm as per the judgment. The petitioner contended that s 291(2) of the Companies Act 1965 was not applicable when determining the issue of interest or rate of interest. Instead, r 87 of the Companies (Winding Up) Rules 1972 ('Rules') should apply as the rule deals specifically with issues on interest in a wound up company. Federal counsel representing OR submitted that by virtue of s 291(2) of the Act, bankruptcy

A laws in particular s 43(6) of the Bankruptcy Act 1967 ('BA') should be applied in admitting the proof of debts. The issues requiring the determination of the court were as follows; (i) whether s 43(6) of the BA applied to issues on interest of debt provable in a winding up; and (ii) whether r 87 of the Rules remained applicable based on the maxim B *generalibus specilia derogant*.

Held, dismissing the petitioner's application with costs:

C (1) Section 291(2) authorises the application of law relating to bankruptcy to all debt payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages, which will be admissible to proof against the company. In the same section, it is provided that the same rule shall prevail and be D observed with regard to the respective right of secured and unsecured creditor. On proof of debts, the bankruptcy laws governing the individual, applies to a winding up of companies (see paras 7–8).

(2) Section 291(2) is the law to be applied for proof of debts and by virtue of the same, s 43(6) of the BA comes into operation. Section 43(6), E inter alia, provided for the capping of interest rate in proof of debts to be at 6%pa. Thus s 291 read together with s 43(6) becomes the law applicable to proof of debts and will have the effect of capping the interest rate to 6% in a proof of debts in a wound up company (see para 9).

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(3) Section 291 which incorporates s 43(6) of the BA cannot be said to be a general law as opposed to r 87 being a specific law. Section 291 in fact, is a law that deals specifically with the proof of debts, and it authorises the application of s 43(6) of the BA and consequently, determines the G capping of interest rate applicable. Thus, the contention that the maxim *generalibus specilia derogant* applied in this case was untenable. It was not a case of a conflict between a general law and a specific law. It was a conflict between provisions in the Acts of Parliament and a subsidiary legislation. Section 291 of Act read together with s 43(6) of BA would H be inconsistent with r 87 of Rules. In reconciling this conflict, s 23 of the Interpretation Acts 1948 and 1967 applied (see paras 13–14).

[Bahasa Malaysia summary

I Pempetisyen telah membuat satu permohonan untuk mengakas atau mengubah keputusan pegawai penerima ('OR') ke atas hutang-hutang yang telah dibuktikan. OR telah menggantikan faedah 1.5% sebulan yang telah diberikan melalui penghakiman yang bertarikh 20 Januari 2005 dengan faedah 6% setahun ke atas hutang-hutang yang telah dibuktikan. Jumlah

penghakiman sebanyak RM167,017.62 bersama dengan kadar faedah kontraktual sebanyak 1.5% sebulan telah diperolehi terhadap defendan. Berdasarkan penghakiman tersebut, pempetisyen telah memfailkan petisyen supaya responden digulung di bawah s 218 Akta Syarikat 1965 ('Akta') dan telah dibenarkan oleh mahkamah ini pada 19 Januari 2006. Pempetisyen telah memfailkan bukti hutang sejumlah RM206,110.38. Pada 28 Januari 2008, OR telah menerima hutang tersebut hanya bagi jumlah RM164,303.05 selepas penukupan faedah pada kadar 6% setahun sebagai ganti 1.5% sebulan seperti mana dalam penghakiman. Pempetisyen menegaskan bahawa s 291(2) Akta adalah tidak terpakai apabila menentukan isu faedah atau kadar faedah. Sebagai ganti, k 87 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah') seharusnya terpakai sebagai peraturan yang menguruskan secara spesifik dengan isu-isu berkenaan dengan faedah di dalam penggulungan syarikat. Peguam persekutuan yang mewakili OR menghujahkan bahawa menurut s 291(2) Akta, undang-undang kebankrapan terutama s 43(6) Akta Kebankrapan 1967 ('AK') seharusnya terpakai di dalam menerima bukti hutang. Isu-isu yang memerlukan pertimbangan mahkamah adalah seperti berikut; (i) sama ada s 43(6) Akta Kebankrapan 1967 ('AK') terpakai kepada isu-isu berkenaan dengan faedah hutang yang dibuktikan di dalam satu-satu penggulungan; dan (ii) sama ada k 87 Kaedah kekal terpakai berdasarkan kepada maksim *generalibus specilia derogant*.

Diputuskan, menolak permohonan pempetisyen dengan kos:

(1) Seksyen 291(2) membenarkan pemakaian undang-undang yang berkaitan dengan kebankrapan kepada kesemua hutang yang perlu dibayar ke atas hal-hal di luar jangkaan dan semua tuntutan terhadap syarikat pada masa sekarang atau akan datang, pasti atau bergantung, dipastikan atau kukuh hanya di dalam ganti rugi, yang mana diterima untuk dibuktikan terhadap syarikat. Di dalam seksyen yang sama, ianya memperuntukkan bahawa peraturan yang sama seharusnya mengatasi dan dipatuhi berkenaan dengan hak pemiutang yang bercagar atau pemiutang tidak bercagar masing-masing. Berkenaan dengan bukti hutang, undang-undang kebankrapan yang mengawal selia individu, terpakai kepada penggulungan syarikat (lihat perenggan 7–8).

(2) Seksyen 291(2) adalah undang-undang yang terpakai untuk bukti hutang dan mengikut seksyen yang sama, s 43(6) AK berkuatkuasa. Seksyen 43(6), antara lain, memperuntukkan penukupan kadar faedah di dalam bukti hutang menjadi 6% setahun. Oleh itu s 291 dibaca bersama dengan s 43(6) menjadi undang-undang yang terpakai untuk

bukti hutang dan memberikan kesan penukupan kadar faedah kepada 6% dalam bukti hutang di dalam penggulungan syarikat (lihat perenggan 9).

(3) Seksyen 291 yang menggabungkan s 43(6) AK tidak boleh dikatakan sebagai undang-undang am seperti mana berlawanan kepada k 87 yang menjadi undang-undang spesifik. Sesungguhnya s 291, adalah undang-undang yang berurusan secara spesifik dengan bukti hutang, dan ianya membenarkan pemakaian s 43(6) AK dan selanjutnya, menentukan penukupan kadar faedah yang terpakai. Oleh itu, penegasan bahawa maksim *generalibus specilia derogant* terpakai di dalam kes ini tidak dapat dipertahankan. Ianya bukan satu kes percanggahan di antara undang-undang am dan undang-undang spesifik. Ia adalah percanggahan di antara peruntukan-peruntukan di dalam Akta Parlimen dan undang-undang subsidiari. Seksyen 291 Akta dibaca bersama dengan s 43(6) AK tidak konsisten dengan k 87 Kaedah. Dalam menyelesaikan konflik ini, s 23 Akta Pentafsiran 1948 dan 1967 adalah terpakai (lihat perenggan 13–14).]

Notes

For cases on construction of conflicting statutes, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1852–1853.

For cases on proof of debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1477–1489.

Cases referred to

City Securities Pte, Re [1995] 3 SLR 617, HC (refd)

DP Vijandran v Majlis Peguam [1995] 3 MLJ 576; [1996] 1 AMR 129, CA (not folld)

Foong Da Realty Development Sdn Bhd ex-parte Public Bank Bhd (company winding up), Re K28–31 of 2003 (unreported) (refd)

Legislation referred to

Bankruptcy Act 1967 s 43, 43(6)
Bankruptcy Act 1967 [Singapore] s 40(3)
Companies Act 1965 ss 218, 219, 291, 291(2), Part X
Companies Act [Singapore] s 372
Companies (Winding up) Rules 1972 rr 87, 93
Interpretation Acts 1948 and 1967 s 23
Legal Profession Act 1976 s 33(1), 31(1)(h)

JK Phua (Edwin Tan with him) (CM Chiu & Co) for the petitioner.
Noramirah Mohd Shafee (Siti Khamisah bt Khalid with her) (Federal Counsel, Attorney General's Chambers) for the official receiver.

Rohana Yusuf J:

DECISION ON ENCLOSURE 20

[1] The petitioner's application in encl 20, is made under r 93 of the Companies (Winding up) Rules 1972, to reverse or vary the decision of the official receiver ('OR') dated 28 January 2008 on proved debts. The OR had substituted an interest of 1.5%pm given by the judgment dated 20 January 2005 (based on an agreed interest) with an interest of 6%pa on the debt proved.

[2] The judgment sum of RM167,017.62 together with a contractual interest rate of 1.5%pm was obtained against the defendant. Based on that judgment, the petitioner petitioned for the respondent to be wound up under s 218 of the Companies Act 1965 and it was granted by this court on 19 January 2006. The petitioner filed its proof of debts in exh LCW-3 for a total sum of RM206,110.38. On 28 January 2008, the OR admitted the debt of only RM164,303.05 after capping the interest rate at 6%pa instead of the 1.5%pm as per the judgment.

[3] Learned counsel for the petitioner Encik JK Phua (Encik Edwin Tan with him) contended that the OR was wrong in capping the interest rate to 6%pa but should instead allow the contractual interest of 1.5%pm adjudged by the court. He relied on r 87 of the Companies (Winding Up) Rules 1972 ('Winding Up Rules') and contended that s 291(2) of the Companies Act 1965 which incorporates the laws on bankruptcy is not applicable to determine interest rate on proved debt. This is because according to him s 219 does not deal with 'interest rate' specifically but only deals with proof of debts in the three following categories viz; respective right of secured and unsecured creditors, debt provable and valuation of annuities.

[4] He further contended that even though s 291 deals with debt provable, it does not deal with *interest* on debt provable, and cannot be said to import the capping or imposition of interest on debt provable under the bankruptcy laws. In other words s 291(2) of the Companies Act 1965 is not applicable when determining the issue of interest or rate of interest. Therefore according to him even in applying the law on bankruptcy, the rate of interest is not meant to be applicable. He argued that instead of s 291(2) of the Companies Act, r 87 of the Winding Up Rules should apply as the rule deals specifically with issue on interest in a wound up company. He further contended that even if in the event that s 291 applies, there is a possible conflict between

s 291 and r 87. In that event, r 87 should be given precedence, based on the principle of *generalibus speilia derogant*, because r 87 is a rule made specifically for winding up of a company.

[5] The OR represented by federal counsel Cik Noramirah bt Mohd Shafee and Cik Khamisah bt Khalid submitted that in allowing the proof of debt filed by the petitioner the OR relied on s 291 of the Companies Act. Learned federal counsel contended that s 291(2) calls into operation the bankruptcy laws in relation to all persons who would be entitled to prove debts. By virtue of s 291(2) of the Companies Act, bankruptcy laws in particular s 43(6) of the Bankruptcy Act 1967 should be applied in admitting the proof of debts. The learned federal founsel placed reliance on an unreported decision in *Re Foong Da Realty Development Sdn Bhd ex-parte Public Bank Bhd (company winding up)* K28–31 of 2003. In rebutting the contention of the petitioner the federal counsel also cited the Singapore case of *Re City Securities pte* [1995] 3 SLR 617 which applies bankruptcy laws in determining the cut off date for computing interest. The Singapore High Court in that case held that the combined effect of similar provisions of s 291(2) which is s 372 of the Singapore's Companies Act, with s 40(3) of the Singapore Bankruptcy Act 1967 which is similar to s 43(6) of the Malaysian Bankruptcy Act applies the bankruptcy law to determine the cut off date for the computation of interest. As the provisions of bankruptcy law applicable contains both cut off date, and the rate of interest, it is quite clear that the rate of interest in the bankruptcy law applies to the proved debts in a winding up.

[6] From the submissions of both parties, the following issues require the determination of this court:

(i) whether s 43(6) of the Bankruptcy Act 1967 applies to issue on interest of debt provable in a winding up; and

(ii) whether r 87 of the Winding Up Rules remains applicable based on the maxim *generalibus speilia derogant*.

APPLICATION OF S 43(6) OF THE BANKRUPTCY ACT 1967

[7] Under the Companies Act Part X deals with winding up of a company. Section 291 is on proof of debts. Section 291(2) provides as follows:

> Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the

> assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

Quite plainly, s 291(2) authorises the application of law relating to bankruptcy to all debt payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages, which will be admissible to proof against the company. In the same section, it is provided that the same rule shall prevail and be observed with regard to the respective right of secured and unsecured creditor.

[8] From these provisions it is clear that on proof of debts, the bankruptcy laws governing the individual, applies to a winding up of companies. The section that governs the proof of debts in bankruptcy law is s 43(6) of the Bankruptcy Act 1967. Section 43(6) clearly caps the interest rate at not exceeding 6%pa when it provides:

> Where a debt has been proved upon a debtor's estate and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, up to the date of receiving order is granted by the court.

[9] The said unreported decision of Ian Chin J in *Re Foong Da Realty Development Sdn Bhd*, was brought to my attention by federal counsel. I am in agreement with that decision and the contention by Cik Noramirah on this point, that s 291(2) is the law to be applied for proof of debts and by virtue of the same, s 43(6) of Bankruptcy Act comes into operation. Section 43(6), inter alia, provides for the capping of interest rate in proof of debts to be at 6%pa. Thus s 291 read together with s 43(6) becomes the law applicable to proof of debts and will have the effect of capping interest rate to 6% in a proof of debts in a wound up company.

[10] Coming back to the argument of counsel for the petitioner that, s 291(2) of Companies Act applies to merely 'debt provable' and does not cover the 'rate of interest' applicable to proof of debts, is untenable. This is because, the bankruptcy law relating to proof of debts in s 43(6) essentially deals with two main matters on proof of debts. One, the capping of interest on proof of debts, and secondly, the cut off point of the computation date of the interest. Therefore, to say that the interest rate is not applicable to proof of debts when s 291 authorises the application of s 43(6) would tantamount to non-application of the s 43(6) at all. It is like saying that the whole s 43 does not apply to winding up companies despite s 291(2). To suggest that s 291 applies to proof of debts but does not apply or deal with rate of interest

on proof of debts, would cause havoc to the whole application of s 43(6) mandated by s 291(2). What then of that s 43(6), that can become applicable?

INCONSISTENCIES

[11] Having said that, I agree that r 87 of the Winding Up Rules runs at odds with s 43(6). The said r 87 provides as follows:

> On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the ate of the winding up order or resolution, the creditor may prove for interest at a rate not exceeding six per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

Counsel for the petitioner contended that r 87 applies basing on the maxim of *generalibus specilia derogant*. Learned counsel for the petitioner cited the Appeal Court case of *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576; [1996] 1 AMR 129 in support of his contention. This case was relied to contend that the court cannot read the word *interest* on proveable debt into s 291 in absence of clear words used. In *DP Vijandran* the Court of Appeal was faced with the proper construction of s 33(1) of the Legal Profession Act 1976 ('LPA'). Under s 33(1)(h) of the LPA a sijil annual can be refused to an advocate and solicitor on the ground that the said advocate and solicitor 'after having had an *order of committal* or an *order for the issue of a writ of attachment* made against him'. The issue was whether the word 'committal' includes 'conviction'. The Court of Appeal held that such word should be interpreted in real context and referring to a situation in which an advocate and solicitor has been punished for committing contempt. The effect of which is that, the Court of Appeal held that the Parliament in enacting s 33(1)(h) of the LPA was contemplating a situation where the advocate and solicitor had been punished for continuing contempt of court, and cannot be construed to include a conviction. The word conviction should not be read into the section, thus an advocate and solicitor having had an order of committal should not be permitted to appear before court except for very good reason. It was then the Court of Appeal held that s 33(1)(h) of the LPA must be construed *noscitur a sociis*.

[12] Quite different from the above situation, in applying s 43(6) here, I am not reading the word '*interest on proof of debts*' into s 291. It is a natural flow from the intention of s 291 to apply s 43(6) of the Bankruptcy Act which deals with interest on provable debt. For this reason, I find that the rule

of interpretation in *DP Vijandran v Majlis Peguam* does not apply and it is not a case on point here.

[13] Furthermore, s 291 which incorporates s 43(6) of the Bankruptcy Act cannot be said to be a general law as opposed to r 87 being a specific law. Section 291 in fact, is a law that deals specifically with the proof of debts, and it authorises the application of s 43(6) of the Bankruptcy Act and consequently, determines the capping of interest rate applicable. Thus I do not agree that the maxim *generalibus speilia derogant* applies here. It is not a case of a conflict between a general law and a specific law. It is a conflict between provisions in Acts of Parliament and a subsidiary legislation. That s 291 of the Companies Act read together with s 43(6) of the Bankruptcy Act, would be inconsistent with r 87 of the Winding Up Rules. In reconciling this conflict I am of the view that, s 23 of the Interpretation Acts 1948 and 1967, applies. Section 23 of the Interpretation Act provides:

> Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be avoid to the extent of the inconsistency.

[14] Thus r 87 being a subsidiary legislation cannot override s 43(6) of Bankruptcy Act which applies by virtue of s 291 of the Companies Act both of which are provisions under Acts of Parliament. The OR has therefore applied correctly s 43(6) of the Bankruptcy Act in determining the interest on provable debt to be capped at 6%pa. Based on these reasons I therefore dismiss the application of the petitioner in encl 20 with costs.

[15] Be that as it may, I urge the OR to look into tidying up these laws on proof of debts, to ensure a more effective implementation and avoid confusion to parties who seek to prove debts.

Petitioner's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed